

No. 22-16243

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL DEVIN FLOYD,

Plaintiff-Appellant,

v.

SAN JOSE POLICE
DEPARTMENT (SJPd), et al.,

Defendant-Appellees.

No. 22-16243

D.C. NO: 3:22-cv-00751-WHO
Northern District of
California, San Francisco

**CITY OF SAN JOSE'S
SUPPLEMENTAL EXCERPTS OF RECORD
VOLUME 1 OF 1**

Appeal from United States District Court for the
Northern District of California
Honorable William H. Orrick

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SUPPLEMENTAL EXCERPTS OF RECORD**

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FILED

FEB 27 2023

CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**
10 **OAKLAND DIVISION**

DMR

C23-00871

11 Michael Devin Floyd

12 Plaintiff(s),

13 vs.

14 24 Hour Fitness USA

15 Defendant(s).

) Case No.:

) **COMPLAINT FOR VIOLATION OF**
) **CIVIL RIGHTS (non-prisoner)**
) **UNDER 42 U.S.C. § 1981,**
) **42 U.S.C. § 2000**

) **DEMAND FOR JURY TRIAL.**
)
)

16
17 **I. Jurisdiction and Venue**

18 The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 1343
19 as this action involves federal questions regarding the deprivation of Plaintiff's rights
20
21

1 under Section 1981. The Court has supplemental jurisdiction over Plaintiff's related
2 claims arising under state and local law pursuant to 28 U.S.C. § 1367(a).

3 Venue is proper in the Northern District of California pursuant to 28 U.S.C. §
4 1391(a) because a substantial part of the events or omissions giving rise to this action,
5 including the Plaintiff's unlawful removal from 24 Hour Fitness, occurred in this
6 district.

7 **II. Divisional Assignment**

8 The primary incidents involve the Plaintiff and staff members at the 24 Hour
9 Fitness facility located on Whipple Road in Hayward, California. Hayward,
10 California is in the county of Alameda. According to Civil L.R. 3-2(d): "all civil
11 actions that arise in the counties of Alameda, Contra Costa, Marin, Napa, San
12 Francisco, San Mateo or Sonoma shall be assigned to the San Francisco Division or
13 the Oakland Division." The case was filed at the Oakland Division.

14 **III. Statement of Claim**

15 A. Where did the events giving rise to your claim(s) occur?

16 The event occurred at 24 Hour Fitness located at 2480 Whipple Rd, Hayward,
17 CA 94544.

18 B. What date and approximate time did the events giving rise to your claim(s)
19 occur?
20
21

1 The date the main incident occurred was on October 1st, 2022. The
2 approximate time the event started was 7:00 PM. The event probably ended
3 around 10:00 PM. There was another secondary incident that preceded the
4 main incident that happened on July 18th, 2022.

5 C. What are the facts underlying your claim(s)?

6 Before filing this action, the Plaintiff sent the Defendant a letter addressing the
7 incidents that occurred. The letter to the Defendant details all the facts
8 underlying the Plaintiff's claim from the main incident on October 1st, 2022. It
9 will be attached. (Exhibit 1). There was also an attachment sent along with the
10 letter to the Defendant addressing the secondary incident that happened earlier
11 on July 18th, 2022. It will be attached. (Exhibit 2).

12 **IV. Causes of Action**

13 **1. 42 U.S.C.A. § 1981**

14 In a § 1981 case involving a commercial establishment, a discrimination
15 plaintiff must show that: (1) he is a member of a protected class; (2) he sought
16 to make or enforce a contract for services ordinarily provided by the defendant;
17 and (3) he was denied the right to enter into or enjoy the benefits of the
18 contractual relationship in that (a) he was deprived of services while similarly
19 situated persons outside the protected class were not, and/or (b) he received
20 services in a markedly hostile manner that a reasonable person would find
21

1 objectively discriminatory. Fall v. LA Fitness, 161 F. Supp. 3d 601 (S.D. Ohio
2 2016)

3 The Plaintiff is a member of a protected class: he is an African American male. The
4 Plaintiff sought to use the amenities of the gym, services ordinarily provided by the
5 Defendant and within his contract to the gym. The Plaintiff was denied the services of
6 the gym when he was forced to exit the gym without showering and while he was
7 half-naked. Thus the Plaintiff received services in a markedly hostile manner that a
8 reasonable person would find objectively discriminatory.

9 **2. 42 U.S.C.A. § 2000a**

10 “To establish a prima facie case under § 2000a, plaintiff must show that he or
11 she (1) is a member of a protected class; (2) attempted to exercise the right to
12 full benefits and enjoyment of a place of public accommodation; (3) was
13 denied those benefits and enjoyment; and (4) was treated less favorably than
14 similarly situated persons who are not members of the protected class.”
15 Bormuth v. Dahlem Conservancy, 837 F. Supp. 2d 667, 674 (E.D. Mich. 2011)

16 The Plaintiff is a member of a protected class: he is an African American male. The
17 Plaintiff sought to use the amenities of the 24 Hour Fitness gym; the gym is a place of
18 public accommodation. The Plaintiff was denied the services of the gym on two
19 occasions. On both occasions, he was escorted out by the police. The Plaintiff has not
20
21

1 seen other gym members, who have a different ethnicity than the Plaintiff, treated in a
2 similar manner.

3 **3. California Civil Code § 51: Unruh Civil Rights Act**

4 With regard to the Unruh Civil Rights Act particularly, we recently explained
5 that it “must be construed liberally in order to carry out its purpose” to “create
6 and preserve a nondiscriminatory environment in California business
7 establishments by ‘banishing’ or ‘eradicating’ arbitrary, invidious
8 discrimination by such establishments.” (Angelucci v. Century Supper Club
9 (2007) 41 Cal.4th 160, 167, 59 Cal.Rptr.3d 142, 158 P.3d 718.) The Unruh
10 Civil Rights Act “serves as a preventive measure, without which it is
11 recognized that businesses might fall into discriminatory practices.” Munson v.
12 Del Taco, Inc., 46 Cal. 4th 661, 666, 208 P.3d 623, 626 (2009)

13 The Plaintiff was not provided with the full and equal accommodations of 24 Hour
14 Fitness gym in Hayward, despite paying for the gym’s services. On two different
15 occasions, the management at 24 Hour Fitness called the police to escort the Plaintiff
16 out of the facilities. In both of these occasions, the Plaintiff did nothing to warrant his
17 removal from the gym. Indeed, the Unruh Civil Rights Act will serve to banish the
18 arbitrary and invidious discrimination the Plaintiff has endured.

19 **4. California Civil Code § 51.5**

20

21

1 For the same reasons listed in the previous section, the Defendant has violated this
2 California law.

3 **5. California Business & Professions Code § 17200: California Unfair**
4 **Competition Law (“UCL”)**

5 The UCL prohibits, and provides civil remedies for, unfair competition, which
6 it defines as “any unlawful, unfair or fraudulent business act or practice.” (§
7 17200.) Its purpose “is to protect both consumers and competitors by
8 promoting fair competition in commercial markets for goods and services.”
9 (Kasky v. Nike, Inc. (2002) 27 Cal.4th 939, 949, 119 Cal.Rptr.2d 296, 45 P.3d
10 243; see Hall v. Time Inc. (2008) 158 Cal.App.4th 847, 852, 70 Cal.Rptr.3d
11 466.) In service of that purpose, the Legislature framed the UCL's substantive
12 provisions in “ ‘broad, sweeping language’ ” (Cel-Tech Communications, Inc.
13 v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 181, 83
14 Cal.Rptr.2d 548, 973 P.2d 527; see also Bank of the West v. Superior Court
15 (1992) 2 Cal.4th 1254, 1266, 10 Cal.Rptr.2d 538, 833 P.2d 545 [“The
16 Legislature intended this ‘sweeping language’ to include ‘ “anything that can
17 properly be called a business practice and that at the same time is forbidden by
18 law.” ’ ”]) and provided “courts with broad equitable powers to remedy
19 violations” (ABC Internat. Traders, Inc. v. Matsushita Electric Corp. (1997) 14
20
21

1 Cal.4th 1247, 1270, 61 Cal.Rptr.2d 112, 931 P.2d 290). Kwikset Corp. v.
2 Superior Ct., 51 Cal. 4th 310, 320, 246 P.3d 877, 883 (2011)

3 The Plaintiff had a gym membership at 24 Hour Fitness and expected the fair
4 accommodations any patron would expect from a gym membership. Unfortunately,
5 the Plaintiff was forcibly removed from 24 Hour Fitness twice; the Plaintiff was
6 half-naked upon the final removal. The Plaintiff has lost money, time, and sanity as a
7 result of the incidents with 24 Hour Fitness. 24 Hour Fitness, through this unfair act
8 and business practice, has violated this law.

9 **6. California Civil Code § 1750: The Consumers Legal Remedies Act**
10 **(CLRA)**

11 The language of the CLRA allows recovery when a consumer “suffers damage
12 as a result of” the unlawful practice. This provision “requires that plaintiffs in a
13 CLRA action show not only that a defendant's conduct was deceptive but that
14 the deception caused them harm.” (Massachusetts Mutual Life Ins. Co. v.
15 Superior Court, supra, 97 Cal.App.4th at p. 1292, 119 Cal.Rptr.2d 190.) In re
16 Vioxx Class Cases, 180 Cal. App. 4th 116, 129, 103 Cal. Rptr. 3d 83, 94–95
17 (2009)

18 On two different occasions, police have escorted the Plaintiff out of the gym, 24
19 Hour Fitness. On two different occasions, the Plaintiff has done nothing to cause his
20 unwanted removal from the gym. The Plaintiff was forced to cut his workout short on
21

1 the first occasion. While half-naked, the Plaintiff was removed from the gym and not
2 allowed to return after the second occasion. The Plaintiff has battled with
3 post-traumatic stress since these incidents. He is seeking help from licensed
4 professionals and attends support groups. The Plaintiff has also purchased a gym
5 membership from a different gym.

6 **7. Restatement (Second) of Torts § 46 - Intentional Infliction of Emotional**
7 **Distress**

8 To state a claim for intentional infliction of emotional distress, a plaintiff must
9 plead “ ‘(1) extreme and outrageous conduct by the defendant with the
10 intention of causing, or reckless disregard of the probability of causing,
11 emotional distress; (2) the plaintiff's suffering severe or extreme emotional
12 distress; and (3) actual and proximate causation of the emotional distress by the
13 defendant's outrageous conduct.’ ” (Wilson v. Hynek (2012) 207 Cal.App.4th
14 999, 1009.) Guzman v. Peckson, No. B264039, 2016 WL 1623115, at *2 (Cal.
15 Ct. App. Apr. 21, 2016). Restatement (Second) of Torts § 46.

16 The Plaintiff pleads that (1) the Defendant, on two occasions, has caused the
17 Plaintiff emotional distress through having the Plaintiff forcibly removed from the
18 gym facilities. The Plaintiff committed no crimes or infractions in both instances. The
19 Plaintiff was accused of committing sexual harassment acts on both occasions. The
20 Plaintiff pleads that (2) the Plaintiff has and is currently suffering extreme and
21

1 emotional distress caused by the incidents in this complaint. The Plaintiff also pleads
2 that (3) the actual causation of the emotional distress was caused by the Defendant's
3 outrageous conduct.

4 **8. Restatement (Second) of Agency § 213 - Negligent Training and**
5 **Supervision; Restatement (Second) of Torts § 317 - Negligent Supervision**

6 Under California law, an employer may be held directly liable for the behavior
7 of an unfit employee where the employer was negligent in the hiring, training,
8 supervising, or retaining of that employee. Delfino v. Agilent Techs., Inc., 145
9 Cal.App. 4th 790, 815 (2006). "A plaintiff alleging negligent training under
10 California law must show that the employer negligently trained the employee
11 as to the performance of the employee's job duties and as a result of such
12 negligent instruction, the employee while carrying out his job duties caused
13 injury or damage to the plaintiff." Garcia ex rel. Marin v. Clovis Unified Sch.
14 Dist., 627 F.Supp.2d 1187, 1208 (E.D.Cal.2009) (citing State Farm Fire &
15 Casualty Co. v. Keenan, 171 Cal.App.3d 1, 23 (1985)). Wells v. Regents of
16 Univ. of California, No. 15-CV-01700-SI, 2015 WL 5138181, at *6 (N.D. Cal.
17 Sept. 1, 2015)

18 The Defendant employs the persons responsible for both incidents that created this
19 lawsuit. The Defendant remained the employer of those persons after the incidents
20 occurred. The two employees from the first incident remained employees; the
21

1 Plaintiff saw them occasionally afterwards. The employees within the locker room
2 during the second incident also remained employees after the second incident; on the
3 numerous occasions the Plaintiff frequented the gym afterwards attempting to
4 reinstate his membership, the Plaintiff saw those employees. At least one employee
5 from each incident is a manager. The same pattern of negligent behavior happened on
6 two occasions, with the Plaintiff being reprimanded instead of the employees and
7 accusers.

8 **9. Restatement (Second) of Agency § 219 - When Master is Liable for Torts**
9 **of His Servants**

10 An employer is subject to liability for the torts of its employees acting outside
11 the scope of their employment when, inter alia, the employer itself was
12 negligent or reckless, Restatement § 219(2)(b), or the employee purported to
13 act or to speak on behalf of the employer and there was reliance upon apparent
14 authority, or he was aided in accomplishing the tort by the existence of the
15 agency relation, id., § 219(2)(d). Burlington Indus., Inc. v. Ellerth, 524 U.S.
16 742, 744, 118 S. Ct. 2257, 2260, 141 L. Ed. 2d 633 (1998)

17 In both instances where the Plaintiff was removed from the Defendant's place of
18 business, there was a manager present. It is reasonable for the Plaintiff to believe
19 those managers had authority to act on behalf of the Defendant. This belief is
20 traceable to the Defendant's manifestations: the Defendant placed the title 'manager'
21

1 upon these respective employees. Thus, the employer is subject to liability for the
2 actions of their employees in this instance.

3 **10. Restatement (Third) of Agency § 7.01 - Agent's Liability to Third Party**

4 [A]n agent acting with actual or apparent authority remains liable to a third
5 party for the agent's own tortious conduct. Restatement (Third) Of Agency §
6 7.01 (2006); Warner v. Sw. Desert Images, LLC, 180 P.3d 986, 992 (Ariz. Ct.
7 App. 2008) (quoting Griffith v. Faltz, 785 P.2d 119, 120-21 (Ariz. Ct. App.
8 1990)). Eversource Cap. LP v. Fimrite, No. CV-18-02583-PHX-SMM, 2019
9 WL 11638377, at *4 (D. Ariz. May 21, 2019)

10 The Plaintiff holds the agents employed by the Defendant responsible for their
11 tortious conduct. During the first incident in July 2022, there was a manager and an
12 employee present requiring the Plaintiff leave the gym facilities. During the second
13 and main incident in October 2022, there was a different manager and employee duo
14 requiring that the Plaintiff leave the gym facilities immediately. The Plaintiff will
15 obtain their names through discovery.

16 **V. Injuries**

17 The plaintiff made this statement: The physical injuries I sustained as a case of the
18 events that occurred were due to the handcuffs. At the end of my detainment, I had
19 very dark marks on my wrists as a result of the handcuffs. As far as the economical
20 injuries, I can no longer access 24 Hour Fitness. This required me to purchase a
21

1 membership at a different, less convenient gym. 24 Hour Fitness conveniently had
2 many locations in the California Bay Area and Santa Cruz, whereas my current gym
3 has many fewer locations in the Bay Area and no locations near Santa Cruz. I travel
4 frequently; those 24 Hour Fitness locations were detrimental to my ventures. Thus, I
5 have to spend more time and money traveling to the gym, rerouting my ventures as
6 needed. As far as mental injuries, I was traumatized by both incidents. I've abruptly
7 lost many friends I connected with at 24 Hour Fitness and those supporting
8 relationships at the gym. Having already suffered through many other police brutality
9 events, this event has added onto previous traumas, and I feel even more unsafe when
10 near police officers. I constantly fear every conversation I participate in can possibly
11 result in traumatic events like those at 24 Hour Fitness. I am currently in and seeking
12 professional counseling. So far, I have only found an online support group.

13 **VI. Relief**

14 The Plaintiff (he) would like to be compensated for all sustained injuries. As far as
15 economical injuries, the Plaintiff seeks 1500 dollars per month since the suspension
16 of his membership (October 2022). The Plaintiff, on average, has to spend an hour
17 per day driving to a less convenient gym (50 dollars for one hour each day).

18 As far as mental injuries and emotional distress, the Plaintiff suffers from the
19 trauma and embarrassment of having twice been forcefully removed from the gym.
20 The last time, the police pushed the half-naked Plaintiff out of the gym locker room,
21

1 into the gym facilities, and finally outside into a police car. These events occurred
2 because the present manager refused to allow the Plaintiff to shower and collect his
3 belongings. The Plaintiff attends support groups every week and is seeking
4 professional counseling through a psychiatrist or therapist. The Plaintiff demands a
5 total of 3 million dollars, covering mental and traumatic anguish plus the current and
6 future costs of support groups and therapy.

7 The Plaintiff desires his membership at 24 Hour Fitness to be reinstated. The
8 Plaintiff demands 24 Hour Fitness revise its policies regarding member-member and
9 member-employee disputes to prevent occurrences of incidents like this from
10 happening again. As the Plaintiff stated earlier, without any forewarning and on two
11 different occasions, employees and police approached the Plaintiff, accusing the
12 Plaintiff of crimes and demanding the Plaintiff leave immediately. During the last
13 incident, the Plaintiff wasn't noticed there were any problems prior to police arrival;
14 the Plaintiff should have been alerted to the accusations when they occurred prior to
15 police arriving. The Plaintiff should have also been allowed to finish showering and
16 to collect his belongings within the locker room, rather than forced out of the locker
17 room by police.

18 The Plaintiff desires to be compensated for all costs of filing and litigating this
19 lawsuit. The Plaintiff also seeks an award of 2 million dollars in punitive damages
20 plus any other accommodation awarded by the Court.
21

VII. Trial by Jury

The Plaintiff demands a jury trial as provided in Fed. R. Civ. P. 38(b).

DATED: February 24, 2023

Michael Floyd

Michael Devin Floyd

1 **VIII. Defendants' Known Contact Information**

2 1. 24 Hour Fitness USA

3 1265 Laurel Tree Lane, Suite #200

4 Carlsbad, CA 92011

5 San Diego County

August 20, 2021
Clerk of the Court
Superior Court of CA
County of Santa Clara
C2111237
By: ZSiciliano

Plaintiff,

DA NO: 210813622

CEN

21020495 EGI778 MDF HELD
08/20/2021

Defendant(s).

COUNT 1

COUNT 2

Any defendant, including a juvenile, who is convicted of and pleads guilty and no contest to any felony offense, including any attempt to commit the offense, charged in this complaint or information is required to provide buccal swab samples, right thumbprints and a full palm print impression of each hand, and any blood specimens or other biological samples required pursuant to the DNA and Forensic Identification Database and Data Bank Act of 1998 and Penal Code section 296, et seq.

Further, attached and incorporated by reference are official reports and documents of a law enforcement agency which the complainant believes establish probable cause for the pretrial restraint of defendant MICHAEL DEVIN FLOYD, for the above-listed crimes.

Complainant therefore requests that the defendant(s) be dealt with according to law.

I certify under penalty of perjury that the above is true and correct.

Executed on August 20, 2021, in SANTA CLARA County, California.

DocuSigned by:

webb

888E6E9A4B84170

webb

1155n

(White 4638)

SJPD (408) 277-5271 212300896 C

FEIN/ D367/ FELONY/ RG

THE FOREGOING INSTRUMENT IS
A CORRECT COPY OF THE ORIGINAL
ON FILE IN THIS OFFICE

MAY 04 2022

Clerk of the Court
SUPERIOR COURT OF CALIFORNIA COUNTY OF SANTA CLARA
BY  DEPUTY



C2111237



People of the State of California vs. Floyd, Michael Devin

Case Information

Case Type: Complaint - Felony
Case Number: C2111237
Filing Date: 8/20/2021
Case Status: Active
Court Location: Hall of Justice

PARTIES

Show All entries

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Type	First Name
Defendant	Michael

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Attorneys

Show All entries

Search:

Representing	First Name
No data available in table	

HEARINGS

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Department	Type	Date	Time	Result
Department 39	Preliminary Examination	5/12/2022	9:00AM	
Department 39	Preliminary Examination	4/26/2022	9:00AM	Held
Department 39	Preliminary Examination	4/14/2022	9:00AM	Continued: Court's Motion
Department 35	Preliminary Examination	3/18/2022	8:31AM	Held
Department 34	Hearing: Motion hearings	2/24/2022	8:31AM	Held
Department 27	Hearing: Motion hearings	2/22/2022	9:00AM	Held
Department 27	Hearing: Motion hearings	2/14/2022	9:00AM	Held
Department 27	Hearing: Motion hearings	2/14/2022	9:00AM	Held
Department 27	Hearing: Motion hearings	2/14/2022	9:00AM	Held

Department**Type** Case 3:22-cv-00751-WHO Document 36 Filed 05/04/22 Page 16 of 18 **Result**

Department 34

Preliminary Examination

1/27/2022

8:30AM

Held

Department 34

Preliminary Examination

1/27/2022

8:30AM

Held

Department 34

Preliminary Examination

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Held

Department 34

Preliminary Examination

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Held

Department 34

Preliminary Examination

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Continued: Court's Motion

Department 34

Preliminary Examination

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Continued: Court's Motion

Department 34

Preliminary Examination

1/4/2022

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Continued: Court's Motion

Department 34

Preliminary Examination

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Continued: Court's Motion

Department 37

Preliminary Examination

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Continued: Court's Motion

Department 32

Preliminary Examination

12/14/2021

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Held

Department 34

Preliminary Examination

12/10/2021

8:30AM

Held

Department 34

Preliminary Examination

12/10/2021

8:30AM

Held

Department 34

Preliminary Examination

12/10/2021

1:30PM

Held

Department 34

Plea and Identification of Counsel

11/3/2021

9:00AM

Held

Department 34

Hearing: Plea

9/24/2021

1:30PM

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HEARINGS

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Department 24	Arraignment: Complaint	8/20/2021	1:35PM	Held

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Next